Reps. Nadler, Petri, Conyers and Delahunt Introduce Bipartisan State Secret Protection Act of 2008

Wednesday, 12 March 2008

WASHINGTON, D.C. – Congressmen Jerrold Nadler (NY-08), Chair of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Thomas Petri (WI-6), House Judiciary Chairman John Conyers, Jr. (MI-14), and Bill Delahunt (MA-10) today introduced legislation that would ensure meaningful judicial determination of the state secrets privilege. The bipartisan bill, the H.R. 5607, the State Secret Protection Act of 2008, would curb abuse of the privilege while providing protection for valid state secrets.

&Idquo;When a tool designed to protect vital national security information is overused and abused, it undermines the credibility of legitimate claims," said Rep. Nadler. &Idquo;Exaggerated claims of secrecy were used to conceal information in the &Isquo;Pentagon Papers' case, during the Iran-Contra scandal, and in the landmark state secrets case of U.S. v. Reynolds. As these examples show, when a government is allowed to escape accountability by hiding behind unexamined claims of national security, it often will. It is clear that judicial scrutiny of such claims is critical to our constitutional system of checks and balances. Our bill would bring an independent judge into the process to ensure that claims of secrecy are not misused to shield illegal, embarrassing or questionable conduct."

Rep. Petri commented, "Imagine the government locks you up but says you can't see the evidence for reasons of national security. I'm sure there are cases where national security is truly at risk, and that information must be protected. But we shouldn't have to simply take the Executive Branch's word for it. Shouldn't an independent, responsible party apart from the Executive Branch review the material to determine when and how national security really necessitates restricting the use of sensitive material? The answer is, quite obviously, yes. We have a procedure for criminal cases, and we need one for civil cases as well."

&Idquo; The current administration has too frequently used the state secrets privilege to cloak its activities involving rendition, torture, and warrantless surveillance, " said Conyers. &Idquo; While matters of national security require the protection of classified information, our court system is clearly capable of handling this information with the appropriate discretion and care. The executive branch should not be able to escape accountability in the courts and congressional oversight by abusing the state secrets privilege and an independent judge would ensure that does not happen. "

Congressman Bill Delahunt said, "The very case which established the modern version of the state secrets doctrine in American law - U.S. v. Reynolds - serves as a prime example of government abuse of this privilege. A constituent of mine, Susan Brauner's father died in the Reynolds air force bomber crash when she was four years old. For 50 years, Ms. Brauner was denied redress and closure in her father's death because the government refused to disclose material evidence on 'state secrets' grounds. When the accident reports were finally declassified in 2000, they contained no sensitive information, but did reveal the poor condition of the aircraft, compromising the government's case. Since this case was decided, the government has been able to conceal or hide illegal activity by claiming a national security privilege with no oversight. I believe that this legislation takes the right approach in ending the abuse of this privilege while continuing to protect our national security."

The state secrets privilege allows the government to withhold evidence in litigation if its disclosure would harm national security. The purpose of the privilege is to protect legitimate state secrets; but if not properly policed, it can be abused to conceal embarrassing or unlawful conduct whose disclosure poses no genuine threat to national security.

For example, in 1953, the widows of three civilian engineers filed a civil case against the government for negligence in a military airplane crash that killed their husbands. The government, citing national security concerns, refused to provide an accident report of the crash. The Supreme Court, in U.S. v. Reynolds, upheld that refusal, without ever reviewing the documents. When the report was discovered through an internet search fifty years later, it did not reveal any secret

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military information but, instead, showed the government's negligence in the crash.

And, in the past few years, the Bush Administration's use of the privilege to dismiss cases challenging the most troubling aspects of its war on terror – including rendition, torture, and warrantless wiretapping – have highlighted the need to ensure that judges do not simply accept a government's secrecy claim at face value.

The bipartisan State Secret Protection Act is modeled on existing protections and procedures for handling secret evidence. Specifically, the bill would require a court to make an independent assessment of the privilege claim, and would allow evidence to be withheld only if "public disclosure of the evidence that the government seeks to protect would be reasonably likely to cause significant harm to the national defense or diplomatic relations of the United States."

Under the bill, when this standard is met, a judge must protect the evidence from harmful disclosure, and shall consider whether a non-privileged substitute can be created that would prevent an unnecessary dismissal of the claims. The sponsors noted that through reasonable and uniform procedures and standards, their bill would strengthen national security and the rule of law, and would help restore checks and balances.

Senators Ted Kennedy (D-MA) and Arlen Specter (R-PA), have also introduced similar legislation in the Senate.

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